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No. 99-5716

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

FLOYD J. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether bank larceny, 18 U.S.C. 2113(b) (Supp. IV 1998), is a lesser included offense of bank robbery, 18 U.S.C. 2113(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1999. The petition for a writ of certiorari was filed on August 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one

count of bank robbery, in violation of 18 U.S.C. 2113(a). He was sentenced to 215 months' imprisonment to be followed by three years' supervised release. Pet. App. 4a, 24a-25a.[1]

1. On September 9, 1997, at approximately 2 p.m., petitioner entered the Collective Federal Savings Bank in Hamilton Township, New Jersey, through the door adjacent to the parking lot. Despite the warm weather, he was wearing several layers of clothing and a ski mask that covered almost his entire face. Encountering a customer who was leaving the bank, he pushed her twice, and ordered her to "move over." The customer screamed, alerting other occupants of the bank to petitioner's presence. Pet. App. 4a-5a; C.A. App. 29-32.

Petitioner then ran towards the customer service counter and vaulted over the counter and through one of the teller windows to the area behind the counter. He seized money from several teller drawers and stuffed it into a brown paper bag. Pet. App. 5a. He then moved to within two feet of where two tellers stood and emptied their teller drawers. Ibid. According to one of the tellers, he said he "wouldn't hurt nobody." C.A. App. 79.

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[1] Petitioner previously had pleaded guilty to an indictment charging three counts of bank larceny, in violation of 18 U.S.C. 2113(b), in the United States District Court for the Eastern District of Pennsylvania. The case was transferred, pursuant to Federal Rule of Criminal Procedure 20, to the District of New Jersey for sentencing. He was sentenced on those convictions to a concurrent term of 120 months' imprisonment. Pet. App. 23a-24a.

Nevertheless, two of the tellers testified that they were "scared to death," and one was crying and trembling. Gov't C.A. Br. 3. After removing almost $16,000 in currency, petitioner hurdled back over the teller counter and warned the bank's occupants not to follow him. Police arrested him shortly thereafter. During a subsequent interview, petitioner confessed that he had taken money from the bank. Pet. App. 5a.

Petitioner's defense was that he committed only bank larceny, not bank robbery. He sought to show through his own testimony and cross-examination of the government's witnesses that he did not use intimidation to obtain the bank's money. He challenged the customer's testimony that she had screamed upon encountering petitioner, and that he twice had pushed her. C.A. App. 157-158. According to his account, he wore the ski mask to conceal his identity, and was under the mistaken belief that no customers were in the bank when he entered it. C.A. App. 155-156. He said that he specifically avoided confronting the tellers and first approached a vacant teller station because he did not want to scare the tellers. C.A. App. 159-160. He reassured the tellers that he was "not gonna hurt anybody," and just wanted the money. C.A. App. 161. Finally, after stealing the money, he jokingly told the occupants not to follow him because "I run fast." C.A. App. 164.

Following the close of the government's case, petitioner

sought an acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Specifically, he argued that the government had not proved that he obtained the bank's money through "force, violence, or intimidation," as required by 18 U.S.C. 2113(a). Pet. App. 9a. The court denied the motion, finding sufficient evidence of intimidation. The court went on to discuss the Third Circuit's decision in United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), cert. granted, 523 U.S. 1019, cert. dismissed, 525 U.S. 120 (1998), which held, as a matter of law, that bank larceny is not a lesser-included offense of bank robbery. Relying on Mosley, the court also denied petitioner's request for a jury instruction on bank larceny. Pet. App. 11a-22a. It did, however, charge the jury that "the defense theory of the case" was that "no conduct of the defendant was reasonably calculated to instill fear of bodily harm." C.A. App. 254.

2. The court of appeals affirmed. Following Mosley, the court held that petitioner was not entitled to a bank larceny instruction because bank larceny is not a lesser-included offense of bank robbery. It emphasized that its holding in Mosley was a legal one, resting "solely on a legal interpretation of Sections 2113(a) and (b)." Pet. App. 7a. It declined to reconsider its decision in Mosley, finding that specific intent, while an essential element of a violation of Section 2113(b), is not a requisite element of bank robbery. The court also rejected

petitioner's claim that the evidence did not sufficiently establish that petitioner used force, violence or intimidation to steal the money. Pet. App. 7a-8a, 10a.

DISCUSSION

Petitioner contends (Pet. 7-15) that the court of appeals erred in holding that a bank larceny instruction was not required on the ground that bank larceny is not a lesser-included offense of bank robbery. He notes that this Court had granted certiorari in Mosley, but that the Court ultimately dismissed the petition because Mosley died before the case was decided. Because the legal issue in this case is identical to that of Mosley, and because the Court granted the petition in that case to decide the question presented, the petition in this case should be granted.

1. The court of appeals relied on Mosley, which correctly held that bank larceny is not a lesser-included offense of bank robbery. Under the test for determining greater and lesser offenses set forth in Schmuck v. United States, 489 U.S. 705 (1989), the controlling question is whether the elements of one offense are a subset of the elements of the other offense. Because the putative lesser offense of bank larceny under 18 U.S.C. 2113(b) (Supp. IV 1998) has statutory elements that are omitted from the bank robbery offense in 18 U.S.C. 2113(a), bank larceny is not a lesser-included offense.

Section 2113(a) defines bank robbery, in pertinent part, as

follows:

> Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

Section 2113(b) (Supp. IV 1998) defines bank larceny, in pertinent part, as follows:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association.

Under the "elements" test, bank larceny is not a lesser-included offense of bank robbery because bank larceny has three textual elements that are omitted from the bank robbery offense: (1) an intent to steal; (2) a "carries away" actus reus element; and (3) a requirement that the property taken have a monetary value. The text of a federal statute ordinarily defines its elements. See Bates v. United States, 522 U.S. 23 (1997) (specific intent to injure or defraud is not an element of the offense of misapplication of funds); United States v. Wells, 519 U.S. 482 (1997) (materiality is not an element of false statement to a federal bank offense). And, when Congress includes certain language in one section of a statute and omits it in another, Congress is presumed to act deliberately in the disparate inclusion or exclusion. Russello v. United States, 464 U.S. 16,

23 (1983). Despite the common law status of robbery and larceny as greater and lesser offenses, nothing in the legislative history of Section 2113 indicated that Congress intended to codify the common law requirement of intent to steal in the bank robbery statute. Nor is there justification for reading the "carries away" or valuation elements of bank larceny into the bank robbery offense.

Nevertheless, the courts of appeals have reached conflicting conclusions on the question whether bank larceny is a lesser-included offense of bank robbery. The Third Circuit's holding is supported by the Ninth Circuit. See United States v. Gregory, 891 F.2d 732, 734 (9th Cir. 1989). In contrast, the First, Fourth, Fifth, Seventh, and Eighth Circuits have stated to the contrary. See, e.g., United States v. Sandles, 80 F.3d 1145, 1147 n.1 (7th Cir. 1996); United States v. Walker, 75 F.3d 178, 180-181 (4th Cir.), cert. denied, 517 U.S. 1250 (1996); United States v. Smith, 40 F.3d 933, 935 (8th Cir. 1994); United States v. Henson, 945 F.2d 430, 440-441 (1st Cir. 1991); United States v. Flint, 534 F.2d 58, 60 (5th Cir.) (per curiam), cert. denied, 429 U.S. 924 (1976).[2]

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[2] In United States v. Cornillie, 92 F.3d 1108, 1109 (11th Cir. 1996) (per curiam), the court affirmed the district court's ruling denying the requested lesser-included offense instruction on the ground that the evidence did not support the defendant's contention. The court did not address the issue whether, as a matter of law, bank larceny is a lesser-included offense of bank robbery.

In United States v. Brittain, 41 F.3d 1409 (1994), the Tenth Circuit ruled by a divided vote that bank larceny is a lesser-included offense of bank robbery. The lead opinion indicated that bank larceny was probably not a lesser-included offense of bank robbery under Schmuck, but expressed the view that the court was compelled to follow pre-Schmuck circuit precedent to the contrary. 41 F.3d at 1410-1416 (opinion of Brown, S.D.J). A concurring judge concluded that the two crimes are greater and lesser offenses under Schmuck. Id. at 1416 (Ebel, J., concurring). The dissenting judge opined that the two offenses are not greater and lesser offenses under Schmuck. Id. at 1416-1417 (Baldock, J. dissenting). The split opinions in Brittain demonstrate the range of views on this issue.[3]

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[3] We note that this case is also like Mosley in that, even if bank larceny is found to be a lesser-included offense of bank robbery, petitioner here would not be entitled to a bank larceny instruction on the facts presented. Federal Rule of Criminal Procedure 31(c) entitles a defendant to a lesser included offense instruction only if the evidence would permit a rational jury to convict him of the lesser offense while acquitting him of the greater one. Keeble v. United States, 412 U.S. 205, 208 (1973). In this case, petitioner asked for and received an instruction to the jury that "the taking occurred without the use of force, violence, or intimidation." C.A. App. A254. Because the jury rejected that finding, there is no factual dispute that, if resolved in the defendant's favor, would result in a conviction on the lesser offense. See Sansone v. United States, 380 U.S. 343, 350-351 (1965). Thus, even if this Court were to conclude that bank larceny is a lesser-included offense of bank robbery as a matter of law, petitioner would not benefit from that ruling because he cannot establish the prerequisites under Federal Rule of Criminal Procedure 31(c) for the instruction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1999

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES**, by first class mail, postage prepaid, on this 17th day of November, 1999.

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